IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 509

THE CITY OF TACOMA, A MUNICIPAL CORPORATION,
Petitioner,

v.

THE TAXPAYERS OF TACOMA, WASHINGTON, AND ROBERT SCHOETTLER, AS DIRECTOR OF FISHERIES, AND JOHN A. BIGGS, AS DIRECTOR OF GAME, OF THE STATE OF WASHINGTON, AND THE STATE OF WASHINGTON, A SOVEREIGN STATE, *Respondents.*

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. The Respondents' contention that the case is moot is without substance.

The facts and law are clear.

On November 23, 1953, the petitioner filed a request with the Federal Power Commission for extension of the time under Article 28 for commencement of construction (R. 161-163). The Commission, after noting

that the delay was caused by the appeal to the Ninth Circuit Court of Appeals and the subsequent seeking of review in the United States Supreme Court by the respondent Directors, expressly found that the ". . . requested extension of time is not incompatible with the public interest," and ordered the ". . . time for commencement of construction of Project No. 2016 . . . extended to December 31, 1955, four years from the effective date of the license." (R. 159-160) Project No. 2016 was commenced by the petitioner prior to December 31, 1955, by beginning construction of the Mayfield Dam (R. 253). Thereafter, injunctions obtained by respondents have closely restricted petitioner's construction efforts (R. 129, R. 137-8, R. 202, R. 267, R. 377).

The respondents' contention that the case is moot because construction cannot be completed prior to "June 23, 1958", must be rejected for three separate reasons:

First, Article 28 of the license in providing that the licensee "shall complete the project works in 36 months" obviously refers to the date set by the first phrase of Article 28 for commencement of the project, which the Commission's Order (R. 159-160) "extended to December 31, 1955." Therefore, December 31, 1958, not June 23, 1958, is the present completion date.

Second, irrespective of the date, the Act expressly provides that:

> ". . . the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests . . ." (Section 13, 16 U.S.C. § 806)

The Commission now has pending before it an application filed by petitioner for an extension of time in which to complete construction of the Project. Hence, the case can only be considered moot upon the speculation that the Commission, which has previously found that delay caused by legal proceedings by respondents warranted an extension of time, will deny the present application. This Court will not engage in such speculations.

Third, even assuming the Commission could not extend the time for completion, the respondents lack standing to raise this objection here. Congress has specified that a license may be revoked only by the Attorney General in district court proceedings upon the request of the Commission:

> ". . . In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, *then the Attorney General*, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 of this act." (Section 13, 16 U.S.C. § 806) (Emphasis supplied.)

Hence it is the Attorney General, and not respondents, who alone has standing to revoke an outstanding license, and he has initiated no such proceedings, nor could he do so upon the present record.

II. Section 21 may not properly be interpreted as a mere venue statute.

The respondent taxpayers (not joined by respondent State and Directors) pose the unique argument that Section 21 grants licensees no federal right of eminent domain, but merely confers a right of venue in the federal courts for the exercise of powers conferred by the State. We characterize this as "unique", for as far as we can find this is the first time such an interpretation has ever been suggested. This Court, in the four instances it has referred to Section 21, has characterized it as a federal grant of eminent domain powers:

(a) *Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369, 378, 379 (1930):

> ". . . *By § 21, licensees are given the power of eminent domain and authorized to conduct condemnation proceedings* in district or state courts . . ."
>
> ". . . Whether § 21, *giving to licensees the power of eminent domain,* confers on them power to condemn rights such as those of respondents, . . ." (Emphasis supplied)

(b) *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n.*, 328 U.S. 152, 180-81 (1946):

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists:

> ". . . § 21, *federal powers of condemnation vested in licensee . . .*" (Emphasis supplied.)

(c) *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 373 (1948):

> ". . . The petitioner, likewise, is not seeking to enforce *such rights as it might have to condemn this land by virtue of its federal license.*[9] Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States *or by one of its licensees in reliance upon rights derived under the Federal Power Act.*" (Emphasis supplied)

In footnote 9, the Court cites Section 21 of the Act.

(d) *Federal Power Com'n.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954):

> "After quoting from §§ 10 (c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), *21 (condemnation rights)* and . . ." (Emphasis supplied.)

Other federal cases similarly interpreting Section 21 and the parallel Section 7 (h) of the Natural Gas Act as a grant of federal eminent domain powers, cited by petitioner at pages 33-34 of its brief, are likewise overlooked or inadequately stated by respondents. For instance *Alabama Power Co.* v. *Gulf Power Co.*, 283 F. 606 (M. D. Ala. 1922) (quoted at p. 61 of petitioner's brief), directly holds that Section 21 confers a federal right of eminent domain upon licensees for the construction of authorized projects designed to develop or improve navigation. And in *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84 (4th Cir. 1940), the court said at page 86, with respect to Section 21:

". . . We think, under this Act, that the condemnor has an election *to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or* under the broader provisions of the Eminent Domain Act of the State of South Carolina." (Emphasis supplied)

In *Thatcher* v. *Tennessee Gas Transmission Co.*, 180 F. 2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829, involving language in Section 7 (h) of the Natural Gas Act, identical with that stressed by respondent in Section 21 of the Federal Power Act, the court held:

". . . Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application the Act has received, leaves us in no doubt *that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act*, and which in all of its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce. Indeed when Congress determined it in the public interest to regulate the interstate transportation and interstate sale of natural gas as provided by the Act of 1938 and the amendment of 1942, so that companies engaged in such business not only could not operate except under the authority provided by the statute, but could also be required to provide additions and extension of service, it was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, *by the grant to such company of the right of eminent domain.* The possession of this right could well be considered necessary to insure ability to comply with the Commission requirements as well

> as with all phases of the statutory scheme of regulation." (Emphasis supplied)

The legislative history of Section 7 (h) (added to the Natural Gas Act by special amendment in 1947) equating it to Section 21 is noted at page 34 of petitioner's brief.

An analysis of other sections of the Act also reveals that Congress rejected any necessity that licensees possess a condemnation power or capacity under state law duplicating the delegated federal right. In Section 3 (9), defining terms, Congress had available the very language which the respondents and the court below would now read into Section 21. There Congress defined "municipal purposes" to mean and include:

> ". . . all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;"

However, "municipal purposes" is used only once in the Act—in Section 10 (e),[1] exempting municipalities from annual charges. Even here the phrase is so used by Congress to indicate that municipalities may in some instances act beyond the scope of "municipal purposes" where navigation is involved.[2]

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[1] 16 U.S.C.A. § 803 (e).

[2] Section 10 (e) reads in part:

> ". . . *Provided further.* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or *municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation*, licenses therefor shall be issued without charge; . . ." (Emphasis supplied.)

That Congress knew how to specify the applicability of state law is further seen in Sections 19 and 20 of the Act. Congress here expressly provided for the state regulation and control of power rates, charges, and services by licensees in certain situations. See *Safe Harbor Water Power Corp.* v. *Federal Power Com'n.*, 124 F. 2d 800, 806 (3rd Cir. 1941), *cert. denied*, 316 U.S. 663 (1942). Compare also the language of Section 201 (f) in Part II, "Regulation of Electric Utility Companies Engaged in Interstate Commerce," which provides that Part II shall not include a state or any political subdivision of a state. All of the sections of the Act involved in the present litigation are in Part I, which makes no such exclusion. Such language is absent from the immediately following Section 21.

Furthermore, if Section 21 were purely a venue statute, it would not expressly authorize "the exercise of the right of eminent domain in the district court . . . *or in the State courts.*"

Apparently, this was also overlooked by respondent taxpayers with respect to their contention regarding the Eleventh Amendment (Taxpayer's brief, p. 17), for the authorization of state court suits disposes of any possible claim that the Act is inoperative under that amendment.[1] Certainly the State of Washington's voluntary intervention as a party defendant in the present litigation precludes any consideration of the Eleventh Amendment as a bar to the power of

[1] That the state courts are available to Tacoma for the condemnation of state-owned property is clear. *Tacoma* v. *State*, 121 Wash. 448, 209 Pac. 700 (1922). It was on this ground that Judge Boldt entered his memorandum opinion in the District Court action with respect to certain state highways. (*Tacoma* v. *Severns* R. 176-8)

Tacoma to take the hatchery now in issue. *California* v. *Taylor*, 353 U.S. 553, 568 (n. 16) (1957). In the *Taylor* case, the Court unanimously rejected an Eleventh Amendment contention made by California identical to that of present respondent taxpayers, as hypothetical:

> "16. The contention of the State that the Eleventh Amendment to the Constitution of the United States would bar an employee of the Belt Railroad from enforcing an award by the National Railroad Adjustment Board in a suit against the State in a United States District Court under § 3, First (p), of the Act is not before us under the facts of this case."

III. Section 21 authorizes the taking of State-owned lands where necessary for the construction of an authorized project licensed by the Commission.

The respondent State and Directors rationalize the unexplained and unsupported rejection by the court below of Section 21 by speculating that the state court "held in essence" that "the Federal Power Act does not specifically mention state-owned property". (Brief, p. 21.)

A similar contention was rejected in *United States* v. *Carmack*, 329 U.S. 230 (1946), upholding a taking of city land dedicated to a public use under the general Condemnation Act of August 1, 1888 (40 U.S.C. § 257) and the Public Building Act of May 25, 1926 (40 U.S.C. § 341). Neither act designated any particular land, but generally authorized the respective federal official to take "such sites and additions to sites as he may deem necessary"[1] or "whenever in his

[1] Section 1 of Public Buildings Act of May 25, 1926, 44 Stat. 630; 40 U.S.C. § 341.

opinion it is necessary or advantageous to the Government to do so."[2] The Court dismissed a contention that the Government lacked specific statutory authority to take the property, as follows:

> ". . . We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both Acts, authority for them to acquire by condemnation the site thus lawfully selected. The judgment exercised by the designated officials in selecting this site out of 22 sites suggested, and out of two closely balanced alternatives, constituted an administrative and legislative decision not subject to judicial review on its merits. It was within the legislative power of Congress to choose or reject this site by direct action. It would have been within its legislative power to exclude from the consideration of its representatives this or other sites, the selection of which might interfere with local governmental functions. Such an exclusion would have been an act of legislative policy. We find no such express or necessarily implied exclusion in the broad language of these Acts." (pp. 242-243.)

Similarly, Section 21 of the Federal Power Act, while authorizing the final condemnation by licensees, carefully reserves the selection of the site and lands to be taken to the judgment of the Commission itself:

> "When any licensee cannot acquire . . . the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir . . . in conjunction with an improvement which *in the judgment of the commission is desirable and justified in the public interest for the pur-*

[2] Section 1 of Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. A. § 257.

pose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." (16 U.S.C.A. § 814.) (Emphasis supplied.)

It was the Federal Power Commission that selected and authorized the Cowlitz dam sites and specified the reservoir areas to be covered by each, after a finding that the "project is best adapted to a comprehensive plan for improving or developing the waterway involved for the use or benefit of interstate or foreign commerce." (Federal Power Commission Order on Project No. 2016, 92 P.U.R. (n.s.) 79; Findings 2 (R. 28), 59 (R. 39), 63 (R. 40-44), Special Conditions 34 (R. 47), 35 (R. 47). Hence, the general authority given by Section 21 is ample for the taking.

Assuming *arguendo* the applicability here of the rule that express legislative authority is necessary for "donees" of sovereign eminent domain powers to take public property devoted to a public use,[1] the courts have concluded that such lands may be taken if "expressed or necessarily implied" by the act in question. See *United States* v. *Carmack*, 329 U.S. 230 (1946), footnote 13 at p. 243. Section 21 expressly authorizes the condemnation of lands "necessary to the construction, maintenance, or operation of any dam, reservoir," etc. Since the project licensed

[1] This is actually only a state rule restricting the right of public utilities, etc., having general eminent domain powers under State law from taking for their own benefit property in the State devoted to some public use. Such a rule seems hardly applicable to a donee of eminent domain powers granted by Congress in a valid federal statute. While federal courts have discussed the rule *obiter* as applicable to federal donees, no case has been found barring a federal donee as such from taking any state public lands in question.

by the Commission cannot be built without taking the fish hatchery lands in question, which are clearly "necessary to the construction" of the project, their taking is necessarily implied by Congress in Section 21. *City of Davenport* v. *Three-Fifths of an Acre of Land*, 147 F. Supp. 794, 799-801 (S.D. Ill. 1957); *Missouri ex rel. Camden County* v. *Union Electric Light and Power Co.*, 42 F. 2d 692, 698 (C.D. Mo. 1930); *cf. Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 17-19 (C.C.D.N.J. 1887); *United States* v. *Sixty Acres, etc.*, 28 F. Supp. 368, 373 (E.D. Ill. 1939).

In addition, the respondents fail to answer the authorities cited by petitioner at pp. 36-40 of its opening brief.

IV. The asserted "lack of capacity" on the part of Tacoma to exercise the federal right of eminent domain granted by Section 21 is but an arbitrary characterization devised in an attempt to circumvent the decision of this Court in the First Iowa and Pelton Dam cases.

The "lack of capacity" argument of respondents is not new to them. They have asserted the identical contention against Tacoma at each stage of the prior proceedings in this case in an effort to block development of the Cowlitz Project:

(a) *Before the Ninth Circuit Court of Appeals.* The respondent State and Directors strenuously argued that the state fish sanctuary act (Chapter 9, Laws of 1949) incapacitated the City from exercising its federal license.

> "The City of Tacoma as a Municipal Corporation Has No Rights Apart From the State of Washington, Nor in Derogation of State Laws, and Therefore the Said City Cannot Be Licensed by

the Federal Power Commission to Build These Dams." (Brief, pp. 68-74)

The argument was specifically rejected by the Ninth Circuit. *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 396 (9th Cir. 1953):

> "Again, we turn to the First Iowa case, supra. There, too, the applicant for a federal license was a creature of the state and the chief opposition came from the state itself. Yet, the Supreme Court permitted the applicant to act inconsistently with the declared policy of its creator, and to prevail in obtaining a license."

(b) *Before this Court on Petition for Writ of Certiorari to the Ninth Circuit.* The respondent State and Directors contended that:

> ". . . The question to be determined is whether the Congress (if such power be invested in Congress) in the Federal Power Act conferred upon the Federal Power Commission authority to issue a license where the licensee is a municipality which has completely failed to comply with applicable state laws relative to the resources in question, and where the project itself is prohibited by state laws passed for the protection of the state's natural resources. . . ." (Petition for Writ of Certiorari, p. 18)

Certiorari was denied, 347 U.S. 936 (1954).

(c) *Before the Supreme Court of Washington: Decision on Demurrer.* The court noted the contention of respondents as follows:

> "It is vigorously asserted by respondents and cross-appellants that appellant, being a municipal corporation created by the state, may not defy the laws of its creator. In other words, assuming that

appellant ever had the power to construct dams on rivers resulting in the destruction of fish life, it is contended that the legislature has taken that right away with respect to the Cowlitz river by enacting the fish sanctuary act (Chap. 9, Laws of 1949)." (R. 89)

This argument was specifically rejected:

"The Federal Power Act defines the term municipal corporation and authorizes the power commission to issue a license to such an entity. Appellant has complied with the state law with respect to the right of a municipality to engage in the business of developing, transmitting and distributing power. Having been granted a license by the power commission, we hold that appellant is at the present time in the same position as any other licensee under the act." (R. 91)

The respondents' present argument found expression in the dissenting opinion on demurrer:

"In so far as chapter 9 is sought to be applied as an exercise of police power, it may or may not have been superseded by the Federal power act, a question we need not now decide. In so far as chapter 9 is sought to be applied as an exercise of the power of the state over subordinate units of government, it has not been superseded. The Federal government may not confer corporate powers upon local units of government, and the Federal power act does not purport to do so. . . ." (R. 92-3)

(d) *Before the Supreme Court of Washington: Decision on Merits.* Again the respondent State and Directors repeated their previous contention that the City of Tacoma, being but a creature of the State, lacked capacity to effectuate its license under state law, but shifted the inhibition from the express state statutory

bars previously rejected (*i.e.*, the fish sanctuary act, Chapter 9, Laws of 1949), to the situation where state law was silent. For the first time the argument was accepted, the new majority adopting in part the language of the earlier dissenting opinion on demurrer.

From a review of these prior proceedings, it is clear that the respondents have indiscriminately and erroneously labeled Tacoma as "lacking capacity" whenever state law did not grant a parallel state right or power duplicating that granted by the federal license. A close look at the decision below shows that the court engaged in the same fallacy—a fallacy rejected by each preceding decision.

All of the cases cited by the court hold merely that Tacoma has no *state right* of eminent domain to take the hatchery. None of the authorities relied upon by the court hold that absence of a state right of eminent domain incapacitates Tacoma from accepting a *federal right* of eminent domain powers. The mere fact that the City has no state right of eminent domain does not and should not mean that it lacks capacity to exercise a federal right. The court below merely assumed this *non sequitur* conclusion—an assumption which is irreconcilable with its other express findings on Tacoma's capacity to exercise its federal license.

In its "Addition to Opinion" (R. 369-371) the court below held that the state laws expressly requiring state permits for appropriation of water, construction of dams, or limiting the height of dams to 25 feet do not incapacitate Tacoma from constructing the Cowlitz project in that they conflict with "the provisions of the Federal Power Act or the terms and conditions

of plaintiff's License for said project." (R. 368) However, with the voiding of these express state laws, the status of state law with respect to these particular matters reverts to precisely the same status as that found by the court to exist regarding the right of eminent domain, *i.e.*, an absence or silence of state law. Hence, on these particular matters formerly covered by the invalidated express state statutes, there is also a "*lack of state statutory power* in the city." Yet the court finds no corresponding incapacity on the part of Tacoma to accept the federal grant and proceed under its license with respect to these matters. For example, when the sanctuary act prohibiting dams over 25 feet high was voided, the court assumed and upheld capacity in the City to build the higher dam authorized by the license, yet no state law authorizes a higher dam. The reason given is that these matters are governed by "the provisions of the Federal Power Act or the terms and conditions of plaintiff's License." Indistinguishable, however, is the petitioner's assertion of its right of eminent domain under Section 21 of the Federal Power Act.

We submit that the court below was only right in its "Addition to Opinion". The absence in petitioner of a state right of eminent domain[1] paralleling the fed-

[1] The passage or nonpassage of an act by the Washington Legislature granting a state right of eminent domain to take the hatchery is irrelevant to the present issue under Section 21. Passage of Senate Bill 264 (Appendix A; Brief of Respondent State and Directors) would simply have avoided the further delay necessitated by the instant certiorari proceedings. However, petitioner desires to correct the misleading impression given by the respondent State and Directors regarding the legislative history of Senate Bill 264. It was not Tacoma's S.B. 264 that was first voted upon by the State Senate but "Substitute S.B. 264" prepared by the Senate Committee on Public Utilities. This measure

eral right granted by the Federal Power Act can present no bar to the exercise of the federal right.

> ". . . [The Act] has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." (p. 171)
>
> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. . . ." (p. 181) *First Iowa Hydro-Elec. Coop.* v. *Federal Power Com'n*, 328 U.S. 152 (1946)

See also *Federal Power Com'n* v. *Oregon*, 349 U.S. 435, 445 (1955):

> ". . . To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. . . . No such duplication of authority is called for by the Act."

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provided that the City would have to pay to the Department of Game, in addition to the cost of the hatchery taken, the annual operational maintenance cost of the relocated hatchery, plus $300,000 for the construction of fish hatcheries on a different river (Skokomish river and Hood Canal). Substitute S.B. 264 passed the Senate February 27, 1957. The House appended further amendments on the floor, the most important of which was a provision which would require the City to indemnify the State annually for the loss of migrating fish caused by construction or presence of the dams. (It should be noted that both the Ninth Circuit Court of Appeals and the Washington Supreme Court below held this loss to be noncompensable. *State of Wash. Dept. of Game* v. *Federal Power Com'n.*, 207 F. 2d 391, 398 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954); *City of Tacoma* v. *Taxpayers of Tacoma*, 49 Wn. 2d 781, 307 P. 2d 567 (1957) (R. 370)). It was Substitute Senate Bill 264, as amended, which was defeated by a vote of 49 to 50 on March 12, 1957, not Tacoma's proposal, S.B. 264.

V. Cases cited by respondents to imply that Section 21 is unconstitutional are not in point.

The respondents have selected a random sentence from the case of *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 491, 86 A. 2d 201, 229 (1952), *cert. denied*, 344 U.S. 838, to support their proposition that the Federal Government "cannot grant a power to an agency of the State which the State itself has not seen fit to grant." However, this sentence can only be read properly in the context of the federal statutes the court was considering (Section 5 of Burlington-Bristol Bridge Act, 44 Stat. 589; Section 5 of Tacony-Palmyra Bridge Act, 44 Stat. 1025—both identical). These acts gave no express federal right to the Burlington County Bridge Commission to make a profit on bridge tolls,[1] but left the matter to state legislation. The next sentence in the court's opinion following that quoted by the respondents makes this clear:

> ". . . Even an interpretation of the federal acts most favorable to the defendant county would only *permit the State* to authorize the making of a profit from the operation of the bridges. . . ." (86 A. 2d 201, 229) (Emphasis supplied)

The subsequent District Court case brought by the bridge commission again reiterated this distinction:

> ". . . Indeed, this whole section merely amounts to a consent on the part of Congress that a state or its subdivision may acquire the bridges and operate them and charge tolls. The New Jersey Legislature in promulgating N.J.S.A. 27:19-32 has not seen fit to take advantage of all of the authority

[1] The bulk of the opinion is devoted by the court to its finding of "vicious" "fraud and corruption" on the part of the bridge commission in acquiring the bridge. (See 86 A. 2d at 221.)

offered by Congress. . . . ." *Burlington County Bridge Commission* v. *Meyner*, 133 F. Supp. 214, 218 (D.N.J. 1955)

The district court distinguished the cases upholding the exercise of a federal power "by the instrumentality concerned even though the power had not been granted by the state in its creation" on the ground that:

> ". . . Such is not the situation here. There is no specific federal action, by legislation or otherwise, granting to *the Burlington County Bridge Commission* the right to charge tolls which would provide for a profit on its cost in acquiring the two bridges. . . ."[1] (133 F. Supp. at 217)

Another portion of *Driscoll* v. *Burlington-Bristol Bridge Co., supra*, not cited by respondents, appears to directly support petitioner's present contention. The State of New Jersey sought to condemn the bridges then owned by its sub-division, the Burlington-Bristol Bridge Commission, under state law *or* federal law. The New Jersey Supreme Court first referred to State law, concluding the State Legislature had withdrawn from the State any power to condemn property owned by a public agency. The court next turned to

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[1] The further distinction of the court that

> ". . . in none of those cases was there a prior adjudication by a state court holding that the instrumentality concerned was without power to exercise the authority granted by federal action." (133 F. Supp. at 217)

is not quite accurate. In one of the cases so cited, *Seaboard Air Line R. Co.* v. *Daniel*, 333 U.S. 118 (1948), the Supreme Court of South Carolina had held that Seaboard had no power or capacity under South Carolina law to operate a railroad therein, but this was reversed by the United States Supreme Court, holding that Seaboard could exercise its federally-conferred powers delegated to it by the Interstate Commerce Commission regardless of state law.

the federal acts, which provided in identical Sections 4:

> "After the date of completion of such bridge, as determined by the Secretary of War, either the State of New Jersey, the State of Pennsylvania, any political subdivision of either of such States . . . or any two or more of them jointly [may acquire the bridges] by purchase, or by condemnation in accordance with the law of either of such States governing the acquisition of private property for public purposes by condemnation."

The court found that the bridges could not be condemned by the State under this federal statute, only because the bridges had already been acquired by a public agency thus making the federal act inapplicable by its terms:

> ". . . The State's status and ability to condemn under the federal acts is therefore dependent upon the acts themselves . . ." (86 A. 2d at 228)

The clear implication of the opinion is that had the federal act been applicable by its terms, the State could have exercised a granted federal right of eminent domain regardless of its lack of eminent domain power under state law. Cf. *Antle* v. *Tuchbreiter*, 414 Ill. 571, 111 N.E. 836, 841 (1953).

The case of *Yadkin County* v. *City of High Point*, 217 N.C. 462, 8 S.E. 2d 470 (1940), cited by respondents, concerned solely an exercise by a municipality of its state eminent domain powers. No federal powers under Section 21 of the Federal Power Act were asserted or considered.[1]

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[1] The North Carolina Supreme Court in the companion case to *Yadkin—McGuinn* v. *City of High Point*, 8 S.E. 2d 462 (1940)—had voided the federal license held by the city on the ground that the Federal Power Commission had improperly found the river in question to be navigable.

The quotation in respondent State and Directors' brief from *United States* v. *Tarble*, 13 Wall. 397, 406 (1871), was ended too soon. That Court recognized a "particular" exception to the general rule that neither federal nor state governments should intrude on the jurisdiction of the other:

> "... That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' ..."

In *City of Trenton* v. *New Jersey*, 262 U.S. 182 (1923); *Claiborne County* v. *Brooks*, 111 U.S. 400, 410 (1884); *United States* v. *City Council of Keokuk*, 6 Wall. 514, 516 (1868); *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168 (1942); and *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F. 2d 911 (8th Cir. 1935), cited by respondents, the only matter at issue was the general question of relationships between a state and its municipalities under state law,[1] and none involved a federal statute granting specific federal rights or duties pursuant to Congress' power to regulate interstate commerce. When Congress has so acted, its enactments become the supreme law of the land.

> "... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that

[1] Many similar cases exist regarding a state's power over private corporations, yet the respondents appear to concede that such corporations may exercise federal powers granted by Section 21.

end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (U.S. 1819)

CONCLUSION

For the reasons stated in our opening brief and in this brief, it is respectfully submitted that the judgment below, insofar as it is adverse to the Petitioner, should be reversed.

Respectfully submitted,

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APPENDIX

1. The Federal Power Act, 41 Stat. 1063, *et seq.*, as amended, 16 U.S.C. 791, *et seq.*, provides in part (supplemental to extracts in Appendix A of opening Brief):

Section 10(a), (b), (c), (e)
(16 U.S.C. § 803(a), (b), (c), (e)).

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project-works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes,

shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project

is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes; except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

Section 13 (16 U.S.C. § 806).

SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply ade-

quately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

Section 14 (16 U.S.C. § 807).

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the ex-

pense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 18 (16 U.S.C. § 811).

SEC. 18. The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control

of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof.

Section 19 (16 U.S.C. § 812).

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a com-

mission or other authority for the regulation and control of that specific matter.

Section 20 (16 U.S.C. § 813).

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and

practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Part II. Section 201(f) (16 U.S.C. § 824(f)).

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.